83-1920

No.

IN THE SUPREME COURT OF THE UNITED STATES

(_____ term, 19_____)

RICHARD L. WINDSOR,
Petitioner,

v.

THE TENNESSEAN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S APPENDIX

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Appendix

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(CAVEAT)

1. Petitioner's former petition (No. 83-5611) concerning the state appellate proceedings of necessity was commenced in forma pauperis. It was then converted to a paid petition but was still assigned a 5000-series number in the Supreme Court Clerk's Office.

2. Subsequent to Petitioner's former petition (No. 83-5611) the government moved to intervene in the proceedings in the federal Sixth Circuit. The motion to intervene was granted. The government became a party in the proceedings a few months after government counsel's letter to the federal appellate court clerk.

3. The newspaper Respondents did respond to Petitioner's typewritten petition in No. 83-5611 with a typewritten response of their own pursuant to the Rules. But thereafter when Petitioner filed commercially printed petitions in No. 83-5611 the newspaper Respondents herein made no response.

This instant petition points out an important admission made by the Newspaper Respondents in their typewritten Reply in No. 83-5611. Since they made no reply to Petitioner's commercially printed petitions in No. 83-5611, their admission which has an important bearing on the Supreme court's understanding of the instant issue will only be found in their typewritten reply while No. 83-5611 was proceeding under the in forma pauperis rules.

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 81-5668

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD L. WINDSOR,
Plaintiff-Appellant,

v.

THE TENNESSEAN, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed October 12, 1983

Before: EDWARDS and CONTIE, Circuit Judges and MOYNAHAN, Chief District Judge.*

CONTIE, Circuit Judge, delivered the opinion of the Court with which EDWARDS, Circuit Judge, (p. 18) concurs by writing a separate concurring opinion. MOYNAHAN, Chief District Judge, (p. 19) delivered a separate opinion concurring in part and dissenting in part.

CONTIE, Circuit Judge. Plaintiff Windsor, a former assistant United States attorney, appeals a district court order dismissing

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* The Honorable Bernard T. Moynahan, Jr., Chief Judge, United States District Court for the Eastern District of Kentucky sitting by designation.

his complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P.* 12(b)(6). Appellees are the *The Tennessean*, a newspaper; John Seigenthaler, its publisher; Wayne Whitt and Carol Clurman, two of the newspaper's employees; and Hal Hardin, former United States attorney for the Middle District of Tennessee. The complaint raises claims for damages under the fifth amendment's due process clause, under 42 U.S.C. § 1985(1), under 5 U.S.C. § 552(a) and under state law for defamation, malicious interference with employment and "outrageous conduct." The district court dismissed the federal constitutional and statutory claims. It remanded the state claims, with one exception, to the state court from which the action had been removed. Windsor does not appeal the remand. The state claims against Hardin were dismissed on the ground of absolute immunity rather than remanded.

When evaluating a motion to dismiss brought pursuant to rule 12(b)(6), the factual allegations in the complaint must be regarded as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965). The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Windsor's complaint alleges that the defendants conspired either to remove him from his position as assistant United States attorney (AUSA) or to force him to resign.

After Hardin was appointed United States attorney in 1977, Windsor, who had been appointed in 1974, accused Hardin of favoritism toward certain defendants, attorneys and political parties. Tension between the two increased because of separate incidents involving John Seigenthaler, publisher of *The Tennessean* and a prominent political figure. In early 1979, Windsor mentioned certain matters about Seigenthaler to a local government attorney. When Seigenthaler learned of

this discussion, he called Hardin in anger and claimed that Windsor had disparaged him. In January, 1980, a grand jury witness told Seigenthaler that Windsor had presented evidence to the grand jury linking Seigenthaler to a bingo operation. The latter again became highly upset and complained vociferously to Hardin. Hardin then stormed into Windsor's office and demanded an explanation about why Seigenthaler's name had been mentioned before the grand jury. Plaintiff claims that after this time, Hardin feared Seigenthaler and tried to appease him.

In June, 1980, Windsor was called to testify at a suppression hearing in an insurance fraud case. During this proceeding, the trial Judge expressed concern about prosecutorial misconduct on Windsor's part. Allegedly seizing on the opportunity for revenge against the plaintiff, Seigenthaler caused *The Tennessean* to make "daily fanfare" of these charges while ignoring plaintiff's thorough and satisfactory explanations. In addition, Windsor contends that the newspaper knowingly and/or recklessly made blatantly false statements about him for the dual purposes of injuring his reputation and pressuring Hardin to discharge him.

Hardin, "partially as a result of the pressure put upon him by [Seigenthaler] and partially due to his own friction with [the] Plaintiff joined with and conspired with the other Defendants" (App. at 19) to force Windsor from his job. In furtherance of this conspiracy, Hardin had the insurance fraud case dismissed and the newspaper continued to print defamatory material about plaintiff. In July, 1980, Hardin attended a United States attorneys conference in Oregon. At this meeting, and in furtherance of the conspiracy, Hardin presented to the Deputy Attorney General of the United States and another high official[1] the false and defamatory news articles. He suggested that Windsor be terminated. Hardin also prepared

[1] Neither the Deputy Attorney General nor the other official are parties in this case.

a letter addressed to the plaintiff which stated four reasons for the discharge.[2]

Windsor was next ordered to go to Washington, D.C. in order to meet with Deputy Attorney General Renfrew. Renfrew purportedly told Windsor that the latter was not entitled to due process and that all factual determinations had been made. Plaintiff was given the option of resigning within ten days or being fired and having the damaging letter placed in his personnel file. Several days later, Windsor resigned and the letter was discarded. Windsor sued in state court and the action was removed on December 31, 1980.

I.

Windsor initially contends that he was entitled to procedural due process under the fifth amendment before being terminated. The district court found, however, that since plaintiff possessed no legitimate property or liberty entitlement, due process was not necessary. *See Board of Regents* v. *Roth*, 408 U.S. 564 (1972). We agree with the district court.

Windsor possesses no property entitlement because the Attorney General's power to remove assistant United States attorneys is unconditional. 28 U.S.C. § 542(b). This prerogative has in turn been delegated to the Deputy Attorney General, 28 CFR §0.15(b)(3)(i), who exercised that authority in this case. When a supervisor possesses unconditional power to discharge a subordinate, that employee obviously has no entitlement to his job.

Nor does plaintiff possess a liberty interest. Such an interest could arise if false reasons for the discharge were publicly disseminated, thus stigmatizing Windsor and foreclosing other

[2] The reasons were: 1) drafting a legally insufficient search warrant, 2) issuing grand jury subpoenas for previously suppressed evidence in defiance of a court order, 3) subpoenaing himself to the grand jury and then presenting suppressed evidence and 4) drafting a discourteous memorandum to the court. Windsor contests the validity of all of these grounds for termination which allegedly were based on articles in *The Tennessean*.

employment opportunities. *See, e.g., Roth*, 408 U.S. at 572-73. Windsor does not allege, however, that the reasons for the discharge were publicly disclosed. Consequently, even if the reasons were untrue or fabricated, Windsor has not pleaded a protectible liberty interest in his professional reputation. *Bishop* v. *Wood*, 426 U.S. 341 (1976). Since Windsor has no protectible property or liberty interest in continued employment, this court need not discuss what process would be due were plaintiff to possess such an interest.

II.

In his amended complaint, Windsor seeks damages for an alleged violation of 5 U.S.C. § 552(a).[3] This statute provides rules concerning what information a federal agency may keep about employees, the circumstances and procedures under which that information may be released and the safeguards required in order to insure that all information is accurate. Windsor alleges that Hal Hardin improperly released inaccurate information from Windsor's personnel file in violation of section 522(a)(e)(5) and (10).[4] Nevertheless, the district

[3] On appeal, plaintiff also claims that he is entitled to damages because the government did not follow the procedures required by 5 U.S.C. § 4303, a section of the Performance Rating Act. Since Windsor did not present this claim in his complaint and since the district court did not decide the question, we decline to consider the issue. Were we to decide, however, we would hold that section 4303 does not apply in this case. That statute deals with personnel actions based upon unacceptable performance ratings. The procedural safeguards mandated by that provision apply to removals and reductions in grade affected under that section. Windsor's termination was affected not under that section but under the Attorney General's unconditional power to discharge assistant United States attorneys. 28 U.S.C. § 542(b). Plaintiff therefore has no claim under 5 U.S.C. § 4303. *Cf. Schaefer* v. *United States*, 633 F.2d 945 (Ct. Cl. 1980) (since the Veterans Preference Act and the Performance Rating Act provide separate means of terminating an employee, a discharge under the Veterans Preference Act need not comply with the provisions of the Performance Rating Act).

[4] These provisions read:

> *Agency Requirements.* Each agency that maintains a system of records shall —

court correctly held that plaintiff has stated no claim upon which relief can be granted under that language.

Section 552(a) sets forth remedies for violations of its provisions. A civil damage action may be brought solely against an "agency." 5 U.S.C. § 552(a)(g). The term "agency" does not encompass individual government officials such as Hardin. *Bruce* v. *United States*, 621 F.2d 914, 916 n.2 (8th Cir. 1980); *Parks* v. *United States Internal Revenue Service*, 618 F.2d 677, 684 (10th Cir. 1980). Since Windsor has not sued the agency for which he worked and since Congress could have exposed individuals to civil liability under section 552(a)(g) but chose not to do so,[5] plaintiff has not stated a claim under section 552(a) even if the defendants violated that section in this case.[6]

Windsor claims in the alternative, however, that by conspiring to violate section 552(a)(e)(5) and (10), the de-

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5. Maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

. . .

10. Establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial embarrassment, inconvenience, or unfairness to any individual on whom information is maintained. . . .

[5] If Congress had wanted to subject officials to individual liability, it knew how to do so. For instance, federal officials are subject to the criminal privisions of 5 U.S.C. § 552(a)(i).

[6] We believe that no such infraction occurred. The gravaman of the complaint is that the defendants conspired to present the defamatory newspaper articles to the Deputy Attorney General in order to secure Windsor's discharge. These articles surely were taken, however, not from Windsor's personnel file, but from the public domain. Since defendants did not transgress section 552(a), they would not be liable even if that section provided for individual liability in damages. Moreover, since no violation occurred, this allegation is irrelevant to the questions of section 1985(1) liability or of Hardin's possible immunity, although Windsor contends to the contrary.

fendants infringed upon his constitutional right to privacy. This argument is without merit. While Windsor relies on a congressional finding in the Privacy Act of 1974 that the right to privacy is a personal and fundamental constitutional right, the district court correctly held that this finding does not transform every section 552(a) violation into a constitutional tort. The Supreme Court in *Paul* v. *Davis*, 424 U.S. 693, 712-13 (1976), held that its right to privacy cases prohibited certain restrictions on personal freedom in "matters relating to marriage, procreation, contraception, family relationships and child rearing and education." As was the plaintiff's claim in *Paul* v. *Davis*, Windsor's action is "far afield from this line of decisions" because the claim involves not a substantive restriction on Windsor's freedom in the areas delineated but rather a procedural constraint on the government's authority to collect, hold and distribute information about its employees. *See id.* at 713. Even if defendants transgressed section 552(a), that violation would not implicate Windsor's constitutional right to privacy.

III.

Windsor also claims that the defendants violated 42 U.S.C. § 1985(1) by conspiring to injure the appellant "in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof. . . ." The injury claimed is that defendants conspired to print and did print defamatory newspaper articles about Windsor, knowing the information to be false or with reckless disregard of its truth or falsity. These articles were then used to convince Justice Department officials in Washington, D.C., to terminate appellant. It should be noted that § 1985(1) provides only for damages. Accordingly, plaintiff may not seek reinstatement under that section and thereby circumvent 28 U.S.C. § 542.

Defendants initially contend that the complaint inadequately

alleges conspiracy. While this point was raised before the district court, that court did not discuss it. Both the federal and private appellees argue that the complaint alleges not an agreement between Hardin, Seigenthaler and the other parties, but only a cause and effect relationship wherein Hardin acted independently in response to pressure from the private appellees. The complaint clearly alleges, however, that Hardin conspired and joined with the private defendants in order to drive Windsor from office (App. at 19). That Hardin's partial motive for joining the conspiracy may have been his fear of Seigenthaler cannot obscure the fact that he is alleged to have agreed. Furthermore, Windsor claims that Hardin's personal dislike for appellant contributed to the decision to join.

The private defendants also contend that appellant's conspiracy allegations are conclusory and are therefore inadequate. *See Blackburn* v. *Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971. Although the complaint does not state the exact time and place of the agreement, it does allege that Hardin and the other defendants were in contact with each other throughout the time period in question regarding the Windsor problem. Under the facts of this case, we hold that appellant has adequately pleaded conspiracy.

The district court held that the complaint does not state a claim upon which relief can be granted because section 1985(1) was intended by the 42nd Congress to deal only with violent or physical interference with a federal officer's ability to perform his job. *See Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1334-36 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977). Consequently, the court held that injuries to reputation are not actionable under section 1985(1).

The Seventh Circuit in *Stern* no doubt stated that the problem upon which the 42nd Congress focused did not include unjustified attacks on a federal official's reputation:

> It would, in fact, surprise us if any member of that Congress ever specifically contemplated the application

> of the provisions which became section 1985(1) to a conspiracy to defame and discredit a revenue officer to his superiors. [*Id.* at 1335.]

The *Stern* court nevertheless refused to hold that a conspiracy to defame an Internal Revenue Service officer, which resulted in an adverse employment action being taken against that officer, was not cognizable under section 1985(1) for that reason. Although post-civil war violence in the South induced Congress to act, it responded by passing a statute "cast in general language of broad applicability . . . and unlimited duration." *Id.* Moreover, construing section 1985(1) to encompass the claim raised in Windsor's complaint is consistent with the Supreme Court's approach toward the Reconstruction civil rights statutes. In *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971), for example, the court stated that those statutes should be accorded "a sweep as broad as their language." Defamation has long been regarded in American jurisprudence as an injury to the person. Hence we hold that a conspiracy to harm a federal official's reputation on account of his lawful discharge of his duties, or while engaged in the lawful discharge thereof, is actionable under 42 U.S.C. § 1985 (1).[7]

In its opinion, the district court further expressed concern that exposing Seigenthaler to liability for telephoning Hardin in order to complain about Windsor would infringe upon Seigenthaler's first amendment right to petition for redress of grievances. The court again referred to *Stern*, which held that although it was otherwise possible to state a claim for con-

[7] The district court also held that the complaint does not state a cause of action because transgressions of section 1985(1) would also constitute violations of 18 U.S.C. § 372, a criminal provision and counterpart to section 1985(1) having nearly identical language. The court felt that holding persons and media organizations criminally liable for defamation would raise grave constitutional questions. Since no defendant in this case has been criminally prosecuted, however, the problem of construing 18 U.S.C. § 372 is not before us. We will await the appropriate case before dealing with that issue.

spiracy to defame a federal official under section 1985(1), no cause of action was stated in that case because the threats of suit and of potential liability imposed too great a burden upon the first amendment rights of the private persons who complained about IRS agent Stern. *Id.* at 1344.

We agree with the district court's conclusion but not its reasoning. Windsor admits (appellant's brief at 31) that since the two telephone conversations occurred months before the alleged conspiracy, the conversations cannot be considered part of the scheme to defame the defendant and thereby to procure his discharge. Thus Seigenthaler cannot be liable under section 1985(1) for making the two telephone calls. We disagree, however, with the notion that a private person who conspires deliberately to defame a federal official in order to discredit that official in the eyes of his superiors is protected by the first amendment right to petition for redress of grievances.

In *White* v. *Nicholls*, 44 U.S. (3 How.) 266 (1845), the defendants wrote defamatory letters to the President of the United States in order to procure the discharge of the plaintiff, a federal customs officer. Upon being fired, White sued for libel, alleging that the defendants had transmitted what they knew to be false information. Defendants contended that their actions were absolutely protected by their rights to petition for redress of grievances and to comment upon the fitness of public officials. The court rejected their argument. Though one who unintentionally defamed an official when presenting a complaint would be protected, a person who deliberately did so would not. The court reversed and remanded the case for trial.[8]

Although *White* v. *Nicholls* obviously was not a section 1985(1) action, it is nonetheless analogous to the present case. In both cases, the complaint charged the defendants with

[8] *White* v. *Nicholls* has not been overruled. The Supreme Court cited the case fairly recently. *See Herbert* v. *Lando*, 441 U.S. 153, 163 n.10 (1979).

deliberately attempting to procure the discharge of a federal official through defamation. Section 1985(1) additionally requires that a conspiracy be present. We therefore hold that the first amendment right to petition for redress of grievances does not protect from section 1985(1) liability those who conspire intentionally to defame a federal officer in order to effect that official's discharge. To the extent that *Stern* holds to the contrary, we decline to follow it.

For the same reason that the district court ruled that Seigenthaler could not be held liable for the two telephone calls, it held that *The Tennessean* and its employees could not be sued under section 1985(1) for their part in the alleged conspiracy. In light of the foregoing discussion of *White* v. *Nicholls*, this decision was error. The private appellees are of course entitled to the protections required by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). They therefore may not be held liable for conspiring to print and use defamatory newspaper articles unless they knew the information contained in the articles was false or unless they printed the information with reckless disregard of whether it was true or false. Though the *New York Times* case dealt with state tort law, the rule annunciated is a constitutional test. We see no reason not to apply that test to section 1985(1) actions.

IV.

Although the plaintiff has stated a cause of action under § 1985(1), we hold that each appellee has a valid defense. We first consider the private defendants. Subsequent to the oral argument in this case, the Tennessee Court of Appeals held that the newspaper articles which form the basis of Windsor's federal action were not defamatory under the *New York Times* test. *Windsor* v. *The Tennessean*, (Tenn. App., filed April 26, 1983). As to the private defendants, therefore, the plaintiff is collaterally estopped in the present litigation to prove that the articles are defamatory. *Commissioner of*

Internal Revenue v. *Sunnen*, 333 U.S. 591, 597-98 (1948). Accordingly, the plaintiff's § 1985(1) claim against these defendants must fall; even if Hardin and the media defendants agreed to print and use the newspaper articles at issue in order to procure Windsor's discharge, they agreed to engage in constitutionally protected speech. Such activity cannot form the basis of a §1985(1) action.[9]

Whether Hardin is entitled to assert collateral estoppel is a question we need not reach because the § 1985(1) claim against him can be disposed of without reaching the merits. The district court held that Hardin is absolutely immune from liability in light of the plurality opinion in *Barr* v. *Matteo*, 360 U.S. 564 (1959). Plaintiffs in that case brought a common law libel action against a federal official over the contents of an unfavorable press release issued by that official. The Court held that because this discretionary conduct lay "within the outer perimeter of petitioner's line of duty," *id.* at 575, he was entitled to absolute immunity despite allegations of malice in the complaint. The district court applied *Barr* to the present case and held that since forwarding complaints about Windsor's conduct to the Deputy Attorney General was well within the scope of Hardin's duties, the latter was entitled to absolute immunity from liability under both state law and section 1985(1).

Insofar as it relied upon *Barr* in dismissing the state law claims against Hardin, the district court ruled correctly. *See Granger* v. *Marek*, 583 F.2d 781 (6th Cir. 1978). The district court erred, however, in dismissing the § 1985(1) claim on the basis of absolute immunity. In reaching its decision, the district court distinguished *Butz* v. *Economou*, 438 U.S. 478 (1978). The Supreme Court held in *Butz* that although a

[9] One might claim that the defendants could have conspired to defame the plaintiff in violation of § 1985(1) even though these particular newspaper articles were not defamatory. Since the only overt acts pleaded by Windsor were the publication and use of these articles, this potential argument must be rejected.

federal official remained absolutely immune from liability under state tort law for discretionary actions done within the scope of his authority, such an official merited only qualified immunity for actions taken in violation of the federal constitution. The district court in the present case reasoned that since Windsor has alleged a federal statutory violation rather than a federal constitutional violation, *Butz*, is inapposite and *Barr* controls. We disagree.

Although *Butz* involved solely a constitutional violation, the court commented:

> It is apparent also that a quite different question would have been presented had the officer [in *Barr*] ignored an express *statutory* or constitutional limitation on his authority. [*Id.* at 489 (emphasis supplied).]

Thus the court in *Butz* left open the possibility that federal officials would not be absolutely immune from liability for violating citizens' federal statutory rights. The court held that absolute immunity generally would not be available in such cases in *Harlow* v. *Fitzgerald*, — U.S., —, 102 S. Ct. 2727 (1982). Harlow involved a suit against Presidential aides Bryce Harlow and Alexander Butterfield for conspiring to have Fitzgerald discharged from his job with the Air Force. Plaintiff alleged that defendants were civilly liable for violating the first amendment and both 5 U.S.C. § 7211 and 18 U.S.C. § 1505. Although the court mentioned that *Barr* had granted federal officials absolute immunity from suits at common law, *id.* at 2733, the court held that federal officials who violate statutory or constitutional rights usually merit only qualified immunity. We therefore hold that *Barr* does not control the present case and that Hardin's absolute immunity claim must be evaluated in light of the more recent Supreme Court decisions.[10]

[10] In fairness to the district court, *Harlow* and its companion case, *Nixon* v. *Fitzgerald*, — U.S. —, 102 S. Ct. 2690 (1982), were de-

The general rule is that executive branch officials are entitled only to qualified immunity save in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Butz*, 438 U.S. at 507. Federal officials seeking absolute immunity "bear the burden of showing that public policy requires an exemption of that scope." *Id.* at 506; *see also Harlow*, 102 S. Ct. at 2733, 2735-36. Although the Supreme Court has held that the function of advocating for the conviction of criminal defendants is of such a nature that prosecutors enjoy absolute immunity in discharging that responsibility, *Imbler* v. *Pachtman*, 424 U.S. 409 (1976),[11] the courts of appeals have generally held that prosecutors acting in their investigative or administrative capacities merit only qualified immunity. *See Dellums* v. *Powell*, 660 F.2d 802 (D.C. Cir. 1981); *Mancini* v. *Lester*, 630 F.2d 990 (3d Cir. 1980); *Marrero* v. *City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *Lee* v. *Willins*, 617 F.2d 320 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980); *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 543 U.S. 913 (1981); *Jacobson* v. *Rose*, 592 F.2d 515 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979). While the Supreme Court did not accept or reject the validity of this distinction in *Imbler*, 424 U.S. at 430-31, it appeared willing to endorse the distinction in *Harlow*. 102 S. Ct. at 2735 n.16. Since the duty of recommending the hiring or firing of assistant United States attorneys is a classic example of an administrative function, Hardin is not entitled to absolute immunity in this case.

This conclusion is buttressed by directly applying the criteria which the Supreme Court has found to be relevant in

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cided after the decision in the present case. This court has held that *Harlow* applies retroactively. *Wolfel* v. *Sanborn*, 691 F.2d 270, 272 (6th Cir. 1982).

[11] Although *Imbler* involved a state prosecutor rather than a United States Attorney, this distinction is irrevelant. *See Harlow*, 102 S. Ct. at 2338-39 n.30; *Butz*, 438 U.S. at 504.

adjudicating immunity questions. A decision on immunity must be:

> Predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. [*Imbler*, 424 U.S. at 421.]

In addition, this court must consider public policy arguments. *Nixon* v. *Fitzgerald*, 102 S. Ct. 2690, 2701 (1982).[12]

As has been indicated, prosecuting attorneys have traditionally been accorded absolute immunity only when performing their quasi-judicial functions. One justification for this protection is that prosecutors must be insulated from the threat of retaliatory lawsuits by disgruntled defendants. To permit such suits would deter government prosecutors from vigorously enforcing the law and would require those attorneys to spend inordinate amounts of time defending against civil liability. *See Butz*, 438 U.S. at 508-10; *Imbler*, 424 U.S. at 424-25.

Even though Hardin was performing only an administrative function in this case, he contends that he deserved protection from retaliatory lawsuits foreseeably stemming from the discharge of his duty to make personnel recommendations, favorable or unfavorable, to the Deputy Attorney General. In support of this claim, Hardin cites *Lawrence* v. *Acree*, 665 F.2d 1319 (D.C. Cir. 1981), a section 1985(1) case in which a former regional commissioner of the United States Customs Service sued his superiors for conspiring to force him to resign. The complaint alleged that the defendants had filed an unwarranted adverse performance evaluation about the plaintiff. The court held the defendants absolutely immune because:

> The strong governmental interest in having a frank and honest assessment of federal employee work performance

[12] The court in *Nixon* also held that constitutional and statutory provisions can be relevant to immunity questions. The parties have not cited, and this court has not found, any constitutional or statutory provision which would control this case.

> is absolutely essential to the proper rendering of federal services to our citizens. A supervisor's candid evaluation promotes efficient government by enabling an agency to identify and reward truly outstanding performance and to identify and correct, and on occasion dispense with, performance that is unsatisfactory. The judgment might be distorted if their immunity from damages arising from that decision was less than complete. [*Id.* at 1327.]

While this argument is not without force, it has been blunted by the *Harlow* decision. Of critical importance is that *Harlow* involved an alleged conspiracy to drive a plaintiff from federal employment. Yet the court accorded the defendants only qualified immunity. If Presidential advisors are only entitled to qualified immunity for their participation in personnel decisions, then United States Attorneys should be treated similarly.

Secondly, the burden of retaliatory lawsuits filed by former employees is reduced by the operation of the new qualified immunity standard promulgated in *Harlow*. The test is:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [*Id.* at 2738.]

The trial judge is to apply this purely objective test as a matter of law before discovery occurs. If the law which the defendant is alleged to have violated is clearly established, then the qualified immunity defense should fail and discovery should proceed. If the law is not clearly established, the defendant is immune. The court held that this procedure will adequately protect government officials from insubstantial claims which in the future can be resolved by summary judgment. *Id.* at 2739. The barriers to summary judgment presented by the discarded mixed objective-subjective test, *id.* at 2737-38, no longer exist.

Another factor weighing in favor of qualified immunity is that Windsor has no remedy for the alleged injury caused by Hardin other than a section 1985(1) action; for we have already held that Windsor's constitutional, Privacy Act and state law claims against Hardin were properly dismissed. The presence or absence of alternative remedies has played an important role in the Supreme Court's decisions regarding official immunity. *Nixon*, 102 S. Ct. at 2706 n.38. Furthermore, *Lawrence* v. *Acree* is distinguishable on this ground because the court in that case specifically found that plaintiff had an alternative remedy under the Performance Rating Act. 665 F.2d at 1327. Accordingly, we hold that former United States Attorney Hardin may only assert qualified immunity as set forth in *Harlow*.

Since Hardin's entitlement to immunity is a question of law, we will address the matter rather than require the district court to decide the point on remand. This court is unaware of any case in which a federal official has successfully been sued under section 1985(1) for conspiring to defame a subordinate and to effect the latter's discharge. Although the Seventh Circuit held in *Stern* that injuries to reputation are cognizable under section 1985(1), that case was dismissed upon first amendment grounds which we have declined to follow. Nor were the defendants in that litigation employed in government service.

Consequently, we hold that a reasonable person would not have known in 1980 that an agreement to defame a federal official in order to effect that person's discharge from federal employment violated section 1985(1). Since Hardin did not transgress a clearly established federal statutory right, *Harlow* requires immunity for Hardin in the present case. Similar violations by federal officials or employees will, however, be actionable in the future.

V.

The district court properly dismissed Windsor's claims against all defendants which were based upon the federal constitution and 5 U.S.C. § 552(a). It also correctly dismissed the state law claims against Hardin. Although the plaintiff has stated a claim under 42 U.S.C. § 1985(1), each appellee possesses a complete defense. Accordingly, the judgment of the district court is AFFIRMED.

EDWARDS, Circuit Judge, concurring. I concur in Judge Contie's opinion for the court. I write separately only to note that I would accept the First Amendment reasoning of the majority in *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1342-43 (7th Cir.), *cert denied*, 434 U.S. 975 (1977), as alternative ground for support of the conclusion set forth in Section V. of Judge Contie's opinion.

MOYNAHAN, Chief District Judge, concurring in part and dissenting in part. I concur in the result reached in Judge Contie's opinion, but dissent from that portion thereof which holds that the defendant, Hardin, was not entitled to claim absolute immunity in connection with the § 1985(1) claim.

I am convinced that subjecting the United States Attorney to potential liability for relaying complaints regarding the actions of his Assistant to a Deputy Attorney General is a dangerous precedent and represents a serious erosion of the powers and responsibilities of the United States Attorney.

I am further convinced that such disposition of this case may well provoke extensive litigation and necessitate diversion of the Prosecutor's efforts from the duties of his office to defending himself against baseless suits by disgruntled employees.

I find nothing in the cases cited in the majority opinion, including *Harlow* v. *Fitzgerald*, — U.S. —, 102 S. Ct. 2727 (1982) which militates against this conclusion.

As this expressly prospective ruling promulgated by the majority opinion is of critical importance to the Officers of the Criminal Justice System, I question whether it should be disposed of by a panel rather than by the full Court.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION SITTING AT NASHVILLE

RICHARD L. WINDSOR,
Plaintiff-Appellee,

v.

Coffee Law

THE TENNESSEAN, JOHN SEIGENTHALER, WAYNE WHITT and CAROL CLURMAN,
Defendants-Appellants.

From the Circuit Court at Coffee County, Tennessee
The Honorable Gerald L. Ewell, Judge

Robert L. Huskey of Manchester
Attorney for Plaintiff-Appellee

Alfred H. Knight of Nashville
Attorney for Defendants-Appellants

APRIL 26, 1983
REVERSED AND REMANDED

HIGHERS, J.

NEARN, P.J., W.S. (Concurs)

TOMLIN, J. (Concurs)

Filed and Dated April 26, 1983

This is an interlocutory appeal by the defendants from an order of the trial court denying summary judgment to them on the plaintiff's claim for libel.

I.

The plaintiff Richard L. Windsor, sued the defendants for libel, malicious interference with employment, outrageous conduct, and conspiracy. The denial of summary judgement related only to the libel claim, but defendants contend (and plaintiff denies) that the libel action is dispositive of all claims asserted by the plaintiff. The only question before us is whether there is any genuine issue of material fact on the libel claim so as to preclude summary judgment in favor of the defendants. Rule 56, Tenn. R. of Civ.P.

The plaintiff, a former Assistant United States Attorney, alleges that **The Tennessean**, a Nashville newspaper, and its publisher, managing editor, and reporter published defamatory statements and false innuendos against him. The defendants filed motions to dismiss, which were converted to motions for summary judgment, contending that the statements were non-defamatory, were substantially true, and were privileged under the rationale in **New York Times v. Sullivan**, 376 U.S. 254 (1964), in that the plaintiff is a public figure. The trial court denied all motions, and from that action this appeal is taken.

II.

The articles under consideration related to activities of the plaintiff in his official capacity as Assistant United States Attorney, and the plaintiff concedes for purposes of this lawsuit that he was a public figure at all relevant times. The principal headlines and statements of which the plaintiff complains are as follows:

1. **JUDGE EXPRESSES CONCERN OVER LAWYER'S ACTS** - U.S. District Court Judge Thomas Wiseman expressed grave concern from the bench yesterday about actions of a federal prosecutor who subpoenaed himself before a grand jury, apparently to subvert a court order.

   . . .

   The controversy in connection with Windsor centers on his actions last December, when under a court order to suppress the evidence, he signed a subpoena ordering himself to appear with the evidence before the grand jury. Subsequently, he told the court that the documents which had been sub-

poenaed could not be turned over to the defendants because they had been called for by the grand jury...

At another point during hearing, the judge appeared distressed when Windsor testified that he had conducted no personal contacts with representatives of Capital Life...when [adversary counsel] produced a letter from...counsel for Capital Life addressed personally to Windsor and including the words "pursuant to our telephone conversation," Wiseman called a recess and told the prosecutor to produce the documents he had received from Capital Life.

Windsor later said that he refreshed his recollection and had contacts with the Capital Life lawyer. (July 11, 1980).

2. **SUBPOENA INQUIRY - JUDGE AGAIN GRILLS WINDSOR** - U.S. District Judge Thomas L. Wiseman grilled Assistant U.S. Attorney Richard Windsor angrily for the third straight day yesterday about activities Wiseman had indicated might constitute "prosecutorial misconduct."

. . .

Ordinarily, such evidence - once it was ordered suppressed -would have been returned to the defendants. But in this case, it was not.

Instead, Windsor signed a subpoena ordering himself to appear with the evidence before the federal grand jury...

It was at this point, during testimony earlier in the week, that Wiseman said he smelled "prosecutorial misconduct." And, in fact, attorneys for the defendants have asked for a mistrial because of what they term "prosecutorial misconduct by abuse of the grand jury." (July 12, 1980).

3. **U.S. ATTORNEY'S OFFICE IS PLACED UNDER A CLOUD** (Editorial) - When a federal judge expresses fear that the office of the U.S. District Attorney has engaged in "prosecutorial misconduct," his words should be of grave concern to all who believe that law is the glue that holds the system of justice together...By putting the documents under grand jury seal the prosecutor took the evidence out of the reach of the court and thereby subverted a ruling that would have gone against him...Again, Mr. Windsor was required -and allowed - to refresh his memory as to whether he ever had personal contacts with representatives of an out-of-state insurance company involved in the case. Initially, he testified he had never had such personal contacts. Then a letter was introduced, addressed to him by name, from the in-

surance company's counsel. It discussed the case. That letter also referred to a personal phone call the insurance firm's lawyer had conducted with Mr. Windsor...On Friday, the judge threw Mr. Windsor's insurance fraud case out of court, fearing that the manner in which the attorney handled it would leave "a cloud over the case." (July 20, 1980).

4. **QUITTING PROSECUTOR DISPUTE-RIDDEN** - During three intense days on the stand, Windsor told Wiseman he had issued a subpoena on himself as a means of subverting a court order issued by Chief U.S. District Judge L. Clure Morton...Hardin [the United States Attorney] said he was enraged when he found out that Windsor testified in court about the assistant attorney's attempts to block the chief judge's court order. (August 5, 1980).

5. **U.S. REOPENS CONTROVERSIAL FRAUD CASE** -[Defense counsel] accused federal prosecutors pursuing the case of the same tactic for which Wiseman reprimanded Windsor in July - trying to subvert the judicial system. (September 10, 1980).

6. Sources say that outgoing Assistant U.S. Attorney Richard Windsor initially refused to comply with Blanton's request for a transcript. (September 26, 1980).

These excerpts set forth the principal passages that are germane to the claim made by the plaintiff.

III.

It is the contention of the plaintiff that the published statements are clearly defamatory and that they are either knowingly false or they manifest a reckless disregard for the truth, and that the meaning reasonably conveyed by the language is both false and defamatory. On the other hand, it is the position of the defendants that the statements are non-defamatory or substantially true or constitutionally privileged.

The landmark case involving "a libel action brought by a public official against critics of his official conduct" is **New York Times Company v. Sullivan**, 376 U.S. 254 (1964). The Supreme Court noted that there is "a profound national commitment to the prin-

ciple that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (Citations omitted). 376 U.S. 254, 270. In order to assure that the press will not be hampered or intimidated in its investigation, reporting, or commenting upon official conduct, the Court fashioned a rule, based upon constitutional guarantees, which precludes a public official from collecting damages for a defamatory falsehood related to his official conduct unless the statement was made with "actual malice." The statement of the Court is as follows:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. 254, 279, 280.

In **Press, Inc. v. Verran**, 569 S.W.2d 435 (Tenn. 1978), Justice Henry, speaking for our Supreme Court, stated that "the Supreme Court of the United States has constitutionalized the law of libel and, in material particulars, has preempted state statutory and decisional law in cases and controversies involving the communications media." The Court also made reference to Article I, Section 19, of the State Constitution, which states:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The Court then commented: "To the extent of this controversy this is a substantially stronger provision than that contained in the First Amendment to the Federal Constitution...in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification." 569 S.W.2d 435, 442. The Court equated "abuse of that liberty" in the Tennessee

Constitution with "actual malice" as defined in **New York Times Company v. Sullivan.** In **Press, Inc. v. Verran**, the Court further had this to say at 442:

> Only under the most compelling circumstances should the courts place obstacles in the way of the news media, or muzzle or deter their investigative efforts and redespicable and shorn of all sense of fairness. The right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity or with reckless disregard for the truth.

In **Greenbelt Cooperative Publishing Ass'n. v. Bresler**, 398 U.S. 6 (1970), a developer was seeking certain zoning variances on property he owned, while at the same time the city was attempting to purchase other land owned by him for the construction of a new high school. Public meetings on the negotiations evoked considerable controversy, and the local newspaper reported that some people had called the developer's negotiating position "blackmail." The Court reversed a judgment for the plaintiff, saying: "Because the threat or actual imposition of pecuniary liability for the alleged defamation may impair the unfettered exercise of these First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability." 398 U.S. 6, 12. The Court went on to say:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

398 U.S. 6,14

In **Old Dominion Br. No. 496, Nat. Ass'n., Letter Car v.**

Austin, 418 U.S. 264 (1974), a local union described certain non-union members as "scabs" and quoted a definition of the term which said "a SCAB is a traitor to his God, his country, his family and his class." The Court said:

> The definition's use of words like "traitor" cannot be construed as representations of fact. As the Court said long before **Linn**..."to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies - like 'unfair' or 'fascist' - is not to falsify facts." [Citation omitted] "...However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." [Citation omitted].

418 U.S. 264, 284.

Under these holdings, where there is no false representation of fact, one may not recover in actions for defamation merely upon the expression of an opinion which is based upon disclosed, non-defamatory facts, no matter how derogatory it may be. See Restatement (Second) of Torts, § 566 (1977).

IV.

The alleged defamations have been heretofore set forth under six headings, and it is necessary to review these, along with the documentation submitted to the trial judge, to ascertain whether they create a question of genuine material fact.

FIRST: "REFRESHED HIS RECOLLECTION"

The plaintiff in his complaint alleges that this report by defendants was intended to suggest that the plaintiff gave "false testimony and committed wilful perjury." The transcript of the trial being covered by **The Tennessean** sets forth the following exchange, in which Mr. Windsor was a witness:

Q. That was the first time you got the documents, or the F.B.I. got the documents from Capital Life in connection with this case?

A. Mr. Farmer, I am certain of that. I am convinced of that...

Q. Now, you are certain that the first contact with Capital Life to get the records was one, that agents, the F.B.I.

agents got the records: and two, it was after October 31st. You said you were certain of that.

A. Yes, sir...

Q. [A letter was handed to Mr. Windsor]
Mr. Windsor, would you like to change your previous testimony?

A. No, sir. I see what you - I see what the deputy marshall has handed me here. Now -

Q. Let's just read the date and letter to the court, please, before you explain the discrepancy.

THE COURT: What is the date of the letter?

A. It is October 5, 1979. It is written to me by Roger L. Meredith, assistant counsel for Capital Life Insurance Company. In it he says I have enclosed copies of documents held in our files that we discussed over the telephone this Friday afternoon...

THE COURT: Mr. Brown, I want you to furnish the court as Exhibit 10-A the enclosures that came with this letter. I will give you a few minutes to go find them. I want to see them right now. Go get them...

WINDSOR: Your honor, with Your Honor's permission may I explain my inability to recall this matter?

THE COURT: Yes.

WINDSOR: ...As I was sitting here answering Mr. Farmer's questions, I honestly had no recollection of it. As we were beginning to leave the courtroom to look for them, Mr. Ruth found it in some materials he brought up from his office.

It is readily apparent that the published language is wholly non-defamatory in this instance for at least two important considerations: **First**, it is not libel to say that a witness "refreshed his recollection" while on the stand. Such a scenario regularly unfolds literally hundreds of times in courtrooms throughout this nation. Refreshing one's recollection is in no wise tantamount to giving "wilful perjury," and no reasonable mind could conceivably draw such a conclusion. In the **second** place, however, it is evident from the trial transcript that the published report was a fair, accurate, and reasonable account of the events which transpired. Mr. Windsor, the plaintiff here, did ask if he could be permitted to explain his **"inability to recall** this matter," and he did state that in answering questions from the stand he "**honest-**

ly had no recollection of it." (Emphasis supplied). Clearly, by his own statements, his recollection was refreshed upon examining the letter. It would be an unjustified, unwarranted, and unconstitutional intrusion upon the First Amendment guarantees relating to a free press if we were to hold that this language is an actionable defamation. We do not so hold.

SECOND: "SIGNED A SUBPOENA"

The complaint alleges that this terminology conveyed the meaning to the reader that Windsor did something which he had no authority to do and that he had, in fact, improperly usurped the function of the court clerk. As a matter of fact, the articles in **The Tennessean** say nothing whatever about the duty and function the court clerk, and there is no language to suggest that any act of Windsor was a transgression upon the clerk's authority. It is beyond dispute that the average reader would not know or understand the mechanics by which subpoenas are issued, and it more than strains credulity to suggest that the mere characterization that the plaintiff "signed" a subpoena rather than "issued" a subpoena would conjure up the impression which he asserts was made upon the reader.

Returning once again to the trial transcript, we note the following:

Q. Now, Mr. Windsor, this is a subpoena to Assistant United States Attorney, Richard Windsor, commanding you to appear before the grand jury on the 16th day of January.

A. That is correct.

Q. It was issued to you, and it is issued on application of Richard Windsor, Assistant United States Attorney. Are you the same person in both these?

A. Yes, sir.

Q. You are both Richard Windsors? Is that correct?

A. Yes, sir.

Q. You issued this subpoena to be served on yourself through the grand jury for the records that you had that were seized in that back left-hand room on December 15, 1978?

A. Yes...

It is immaterial that the newspaper stated the plaintiff "signed" the subpoena when, in fact, he "issued" it upon himself. Libel

actions, under the law, are not constituted by technical definitions, strained connotations, and misplaced or even mistaken verbiage. "When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain the charge of libel, no legal harm has been done." **Zoll v. Allen**, 93 F. Supp. 95 at 97, 98 (S.D.N.Y. 1950). The applicable test is "whether the **meaning** reasonably conveyed by the published words is defamatory, 'whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" (Citations omitted). **Memphis Pub. Co. v. Nichols**, 569 S.W.2d 412, 420 (Tenn. 1978). There is no appreciable difference under these facts in whether the plaintiff "signed" or "issued" the subpoena.

THIRD: "CLOUD OVER THE CASE"

The Tennessean editoralized that Windsor "took evidence out of reach of the court and thereby subverted a ruling that would have gone against him..." The trial transcript reveals the following colloquy between Mr. Windsor and the Court:

WINDSOR: As I recall, Mr. Farmer, there was a subpoena for myself...

THE COURT: Which you had issued?

WINDSOR: Certainly.

THE COURT: In order to block a motion to return?

WINDSOR: It hadn't been filed, Your Honor.

Q. You knew it was going to be, didn't you sir?...I want to know if there is prosecutorial misconduct in this case. I am beginning to smell it. I want to hear some more about it. ...

THE COURT: You mean it changed grand juries? You subpoenaed this stuff before a grand jury that didn't return indictment on it?

WINDSOR: Your Honor, there are a number of grand juries running at the same time. My objective was to -

THE COURT: Keep it out of these people's hands.

WINDSOR: Yes, sir.

THE COURT: That is the reason you did it?

WINDSOR: You see, what I wanted to do is bring the matter to issue before Judge Morton, and I set all this out, and had I known we would go into this, I could have prepared some rather extensive written summary lists for Your Honor to-

day. If I had known we were going into this, I could be prepared to show you exactly -

THE COURT: Mr. Windsor, I think I just heard correctly. I think I just heard you say that you intentionally issued a subpoena to yourself for these records in order to block a motion to return the property. Did you say that?

WINDSOR: No, sir, I wouldn't say it that way, but that is what -

THE COURT: Wait just a minute.

WINDSOR: That is what my intention was.

THE COURT: All right.

WINDSOR: Please Your Honor, do not think that I thought I could block the return of the property. I knew very well. Judge Morton had just squarely ruled against me and suppressed this evidence, and knew very well -

THE COURT: That is what I heard you say, Mr. Windsor. And if that is not prosecutorial conduct [sic], Mr. Brown, I don't know what is...

It would be difficult in light of these facts to imagine a more restrained comment upon the official proceedings than that of which plaintiff complains. We find no basis upon which to hold that the plaintiff has made out an issue upon this claim.

FOURTH: "SUBVERTING A COURT ORDER"

The plaintiff avers that there was no court order and that it was false and defamatory to report that he had subverted an order of court. The distinction here is that the transcript said "you intentionally issued a subpoena to yourself for these records in order to **block a motion** to return the property," while the published report said "**subverting a court order**." (Emphasis supplied). The test which we have set out heretofore from **Memphis Pub. Co. v. Nichols**, *supra*, is equally applicable here, and the plaintiff's claim falls far short.

FIFTH: REFUSED "A TRANSCRIPT"

The statement that Windsor initially refused to provide a copy of his grand jury testimony to former Governor Blanton is not a defamatory statement, whether it is true or false. It is neither uncommon nor unlawful for lawyers to refuse voluntary discovery to adversaries, even where there are rules or requirements providing for such discovery under the proper circumstances.

V.

In addition to the foregoing and related claims asserted by the plaintiff, he also relies heavily on the case of **Memphis Pub. Co. v. Nichols**, *supra*. We do not believe that **Nichols** is in conflict with the legal precedents which we have cited or that it is supportive of the plaintiff's case. In that case the trial court granted summary judgment for the newspaper on the basis that all material statements in the published report were literally true. The article said Mrs. Nichols was shot in the arm after a woman assailant "arrived at the Nichols home and found her husband there with Mrs. Nichols." The newspaper failed to report that Mr. Nichols and two neighbors were also present. The Court reversed and held that it was not sufficient that all material facts stated in the news article were substantially true. The Court held: "The proper question is whether the **meaning** reasonably conveyed by the published words is defamatory. . .Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true." 569 S.W. 2d 412, 420.

The **Nichols** case states well the principle that there can be misrepresentation by omission as well as by direct statement and that words which are substantially true can nevertheless convey a false meaning (e.g., that Mrs. Nichols and the assailant's husband were engaged in an illicit relationship). The facts in the case under review are in no way related to the principles enunciated in **Nichols**. As we have seen by a detailed analysis of the allegations of the complaint, there are no direct statements, no omissions, and no implied meanings other than those arising out of a substantially true or non-defamatory recital of the events upon which the news stories are based.

VI.

It is necessary to underscore the definition of "actual malice" as it pertains to cases involving public figures. Tennessee has adopted Section 580A of the Restatement (Second) of Torts (1977), which reads as follows:

> **Defamation of Public Official or Public Figure.** One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other person, or

(b) acts in reckless disregard of these matters.

Press, Inc. v. Verran, 569 S.W.2d 435, 442 (Tenn. 1978).

The plaintiff makes certain allegations in his complaint regarding the "malicious purpose" of the publisher of **The Tennessean**. Liability is not predicated, however, upon "hatred, spite, ill will, or desire to injure" on the part of a defendant, but only upon the "knowledge of falsity or reckless disregard of the truth" standard. *See* **Old Dominion Br. No. 496, Nat. Ass'n., Letter Car. v. Austin**, *supra*, at 281. No fact issue on this allegation has been made out by the plaintiff.

VII.

We are mindful of the stringent requirements which apply to the granting of summary judgments. Summary judgment ought never to be granted where there is a genuine issue as to a material fact, Tenn. R. of Civ. P. 56.03, or where there is uncertainty as to whether there may be a dispute concerning material facts. **Evco Corporation v. Ross**, 528 S.W.2d 20, 25 (Tenn. 1975). Where there are no disputed material facts, however, summary judgment is proper "to provide a quick, inexpensive means of concluding cases..." In this case the trial judge denied the motion for summary judgment, but upon review and after giving great deference to his ruling, we are unable to find any disputed issue of material fact upon any of the plaintiff's claims which would justify submitting this case to a jury or other trier of fact. The determination of whether a published report is **capable** of a defamatory meaning is a question of law for the court. **Memphis Pub. Co. v. Nichols**, *supra*, at 419.

Accordingly, we reverse and direct that summary judgment be entered for the defendants on the libel claim. The matter is remanded to the trial court for entry of the judgment and consideration of other pending claims. Costs of this appeal are adjudged against the appellee.

HIGHERS, J.

NEARN, P.J., W.S. (Concurring)

TOMLIN, J. (Concurring)

U.S. Department of Justice

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May 12, 1983

The Honorable John P. Hehman
Clerk
United States Court of Appeals
for the Sixth Circuit
608 United States Courthouse
Fifth and Walnut Streets
Cincinnati, Ohio 45202

Re: **Windsor v. The Tennessean, et al.**
Sixth Circuit No. 81-5668

Windsor v. The Department of Justice, et al.
Sixth Circuit No. 83-5037

Dear Mr. Hehman:

Subsequent to the submission of the Government's briefs in **Windsor v. The Tennessean, et al.**, Sixth Circuit No. 81-5668, and **Windsor v. The Department of Justice, et al.**, Sixth Circuit No. 83-5037, the Court of Appeals for the State of Tennessee handed down an opinion in **Windsor v. The Tennessean, et al.** which dealt with whether certain newspaper articles about Mr. Windsor were libelous. The Court has found that

such stories about his official conduct as an Assistant United States Attorney were not defamatory and has directed the state court enter summary judgment for the defendants on that issue. We feel the opinion is important to the resolution of the issues presented in each of these appeals. Accordingly, we are enclosing eight copies of the opinion which we ask you to bring to the attention of the Court in each appeal.

Thank you for your assistance.

Sincerely,

James C. Thomason III
Assistant United States Attorney

JCT/dlp
Enclosures

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 1984, I served the foregoing Appendix by causing copies to be mailed, first class, postage prepaid, to: postage prepaid, to:

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